IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 11TH JUNE 2007 / 21ST JYAISHTA 1929

WP(C).No. 15873 of 2005(M)

AGAINST THE ORDER DATED 04/03/05 IN EP 19/2002. IN OS.736/1997 of ADDL.M.C.,KOTTAYAM

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PETITIONER:

K.P.ANTONY, MALIYEKKAL HOUSE,
MALLUSSERRY KARA, KOTTAYAM.

BY ADV. SRI.MATHEW JOHN (K)
SRI.SUJESH MENON V.B.

RESPONDENT:

M.N.CHANDRASEKHARAN NAIR,
KULANGARA PUTHENPARAMBIL HOUSE,
MUTTAMBALAM KARA, KOTTAYAM.

BY ADV. SRI.A.K.HARIDAS

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 11/06/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC : 15873 OF 2005

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 : TRUE COPY OF THE AFFIDAVIT OF THE RESPONDENT DT.18.01.2002.

EXT.P2 : TRUE COPY OF THE COUNTER OF THE PETITIONER.

EXT.P3 : TRUE COPY OF THE ORDER DT.4.3.05 IN EP NO.19 OF 2002 IN OS NO.736 OF 1997, ADDL. MUNSIFF'S COURT,KOTTAYAM.

PIUS C. KURIAKOSE, J.

W.P.(C) No. 15873 OF 2005

Dated this the 11th day of June, 2007

JUDGMENT

Ext.P3 order issued by the execution court directing the arrest of the petitioner in execution of a money decree is under challenge. On receiving notice under Rule 37 the petitioner filed objections contending that he does not have sufficient income to pay the decree debt and that he has not been willfully negligent in the matter of making payment. The matter was enquired into and the petitioner-judgment debtor got himself examined as DW1. He proved Exts.B1 and B2. Ext.B1 is the prescription of Dr.T.A.Abdul Samad, Susrusha Hospital, Kottayam which was relied on by him to show that he is seriously ill. The learned Munsiff noticed that Ext.B1 only prescribes certain medicines and the same is not sufficient to substantiate the case that the petitioner is seriously ill. Learned counsel for the petitioner submits that all the medicines prescribed as per Ext.B1 were medicines for chronic cardiac complaints and not some other diseases. The version of the decree holder was that the petitioner is a contractor. But the petitioner's case was that he was no longer getting any income from contract works. On this aspect of the matter there was only oral evidence of the respondent which was to the effect that Rs.7,000/- per month is being received from his

contract works. As against this, there was counter evidence of DW1 that he is not doing any contract works and that he has not getting any income. The other source of the petitioner, according to the respondent, is income from the immovable properties. Ext.B2 is copy of the delivery kychit dt.26.09.01. It appears that the learned Munsiff has accepted Ext.B2 and practically held that the petitioner does not have any income from the immovable properties. But as for the income from contract works, the learned Munsiff has taken the view that no evidence has been let in by the petitioner to contradict the version of the decree holder. There was the counter evidence of DW1 against the testimony of PW1 which was also oral and not supported by any documents. It appears to me that the issue whether petitioner has income from contract works has not been examined through the right perspective by the learned Munsiff.

2. But the learned Munsiff's view that the petitioner is having the means to pay the decree debt in instalments, cannot be said to totally wrong. But then ability to pay the decree debt in instalments may not be sufficient for justifying the issuance of arrest warrant. The question is whether the judgment debtor had at a point of time any contract work and after the passage of decree or means to pay off the decree debt in lump, or a substantial portion thereof. In other words, after the passage

of decree and till the date of consideration of the application for warrant the petitioner, it has to be shown that petitioner had come to have ability to pay the decree debt in a lump or a substantial portion. I notice that Ext.B2, delivery kychit is of dt.26.9.01 which is at least three months after the decree in this case was finally passed by the trial court. This aspect also has not received requisite attention by the learned Munsiff. Under these circumstances, I am inclined to set aside the impugned order and direct reconsideration of the issue by the learned Munsiff. At the same time considering that the petitioner has means to pay the decree debt in instalments, I am inclined to direct reconsideration only on conditions:

Ext.P3 will stand set aside if the petitioner pays every month commencing from first July towards the decree debt at the rate of Rs.2,500/- till such time as fresh orders are passed. The learned Munsiff will pass orders at her earliest and at any rate within six months of receiving copy of this judgment. It is also open to the petitioner to prove that his health condition is such that his detention in civil prison will not be justified, by producing acceptable medical evidence.

PIUS C. KURIAKOSE, JUDGE

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